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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Definition of an Over-the Air Signal of Grade B Intensity for Purposes of the Satellite Home Viewer Act	)	RM _____
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To the Commission:

COMMENTS ON THE EMERGENCY PETITION FOR RULEMAKING OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

The Satellite Broadcasting & Communications Association ("SBCA") submits these comments in response to the Emergency Petition for Rulemaking filed with the Federal Communications Commission ("FCC" or "Commission") by the National Rural Telecommunications Cooperative ("NRTC") on July 8, 1998 ("NRTC Petition"). As discussed more fully below, SBCA believes that the public interest in fostering the development of satellite television as a viable competitor to cable television requires the Commission to commence expeditiously a rulemaking proceeding to evaluate and refine the definition of "an over-the-air signal of grade B intensity" for purposes of identifying "unserved households" under the Satellite Home Viewer Act ("SHVA"). As the NRTC Petition demonstrates, serious difficulties in the application of the current Grade B standard in the context of the SHVA could deprive millions of consumers of a choice between cable and satellite-delivered programming services by erroneously classifying these consumers as "served" under the SHVA. Indeed, consumer confusion and anger over such erroneous classifications, which stem ultimately from the Grade B standard's origins as a propagation standard rather than as a reception standard, undoubtedly will drive potential satellite subscribers into the arms of cable operators, thereby thwarting the

Commission's overriding goal of reducing cable rates by fostering competition in the video services marketplace.[1]

In the rulemaking proceeding sought by NRTC, the Commission should consider NRTC's proposal for refining -- for purposes of the SHVA -- the Grade B signal intensity standard, but also should solicit and consider the views of others, including engineering, mapping, and geocoding experts, in attempting to address the problems associated with the use of the current definition of Grade B signal intensity for purposes of the SHVA. The refined signal standard should be easy and inexpensive to administer and should identify accurately, on an individual household basis, those consumers who cannot receive a viewable television signal.

BACKGROUND

In its Petition, the NRTC urged the Commission to act expeditiously because "[a]s a result of pending litigation, millions of rural consumers will likely be disenfranchised in the near future."[2] As a result of developments in that litigation since NRTC filed its Petition, that future is now. As described more fully below, a Florida court has ordered satellite carrier PrimeTime 24 to cease providing service to customers who do not reside in an unserved household. Unless the Commission acts quickly on this issue, millions of customers will be unable to receive video programming via satellite and effectively will have no choice but to subscribe to cable. Such a result will further entrench the dominant position the cable industry currently enjoys in the multichannel video programming marketplace, to the detriment of consumers.

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[1] To be sure, there are other aspects of the SHVA that are troubling to the satellite industry, including the new $0.27 monthly per subscriber per signal compulsory license fee and the mandatory 90-day waiting period for new satellite customers who had been cable subscribers. These issues must be addressed in other forums. The problems stemming from the Grade B standard as the measure of unserved households, however, are most appropriately remedied by the Commission.

[2] NRTC Petition at i.

Since the initial passage of the SHVA in 1988, SBCA's members have struggled with the problem identified in the NRTC Petition. Specifically, although the SHVA provides a compulsory copyright license for the retransmission of television signals, it restricts the retransmission of network signals to persons residing in "unserved households" -- the so-called "white area" restriction. An unserved household is one that, in part, "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network."[3] As explained in the NRTC Petition, however, the Grade B signal measurement as currently defined is a measure of predicted signal strength that does not take into account actual terrain and other factors affecting signal propagation.[4] As a result, the Grade B signal coverage area does not accurately reflect the ability of individual households located within that area to receive a viewable television signal. Many people who reside in the Grade B coverage area do not, in fact, receive an acceptable signal for television viewing, but nevertheless may be effectively prohibited under the white area restriction from receiving network signals by satellite due to the lack of a workable coverage standard. The absence of a reliable, effective and affordable coverage standard places enormous burdens on satellite operators, who, despite good faith efforts, are hindered in their efforts to determine whether or not an individual subscriber is eligible to receive network signals.

The white area restriction has been the subject of much controversy. Principally because of it, the United States Copyright Office, at the request of Senator Orrin Hatch, Chairman of the Senate Committee on the Judiciary, last year conducted a review of the copyright licensing

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[3] 17 U.S.C. § 119(d)(10)(A).

[4] NRTC Petition at 4-9.

regimes governing the retransmission by cable systems, satellite carriers and other multichannel video programming distributors ("MVPDs") of over-the-air broadcast signals. The Copyright Office held two days of hearings on the issue and subsequently issued a report in which it stated that "[t]he unserved household restriction has created considerable turmoil not only between satellite carriers and broadcasters, but between consumers and the federal government."[5]

The turmoil between satellite carriers and broadcasters has escalated in the last year and a half, as broadcasters have sued a satellite carrier for copyright infringement based upon alleged violations of the white area restriction.[6] In one of those suits, the judge recently preliminarily enjoined, on a retroactive basis to March 11, 1997, satellite carrier PrimeTime 24 from delivering certain network programming to any customer "within an area shown on Longley-Rice propagation maps, created using Longley-Rice Version 1.2.2 . . . , as receiving a signal of at least grade B intensity . . . "[7] As a result of that injunction, it is possible that more than a million current subscribers will have their access to certain network television services terminated despite the fact that they cannot receive an adequate over-the-air signal. Moreover, potential subscribers who are in fact eligible will be denied access to network signals altogether because, in the absence of a workable, cost-effective test for determining eligibility to receive network signals and with the threat of contempt proceedings facing them, satellite operators will

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[5] U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, at 117 (1997) ("*Copyright Office Report*").

[6] *See, e.g., Cannan Communications, Inc. v. PrimeTime 24 Joint Venture*, CIV. No. 2-96-CV-086 (N.D. Tex, Amarillo Division); *CBS, Inc. v. PrimeTime 24 Joint Venture*, CIV-Nesbitt No. 96-3650 (S.D. Fla., Miami Division).

[7] Supplemental Order Granting Plaintiffs' Motion for Preliminary Injunction, *CBS, Inc. v. PrimeTime 24 Joint Venture*, CIV-Nesbitt No. 96-3650 (entered July 10, 1998). In a separate lawsuit pending in the U.S. District Court in Raleigh, North Carolina, the judge has granted summary judgment against PrimeTime 24. *See* Order, *ABC, Inc. v. PrimeTime 24, Joint Venture*, Civil Action No. 1:97CV00090 (entered July 16, 1998).

exercise extreme caution and err on the side of refusing service to ensure their compliance with the law.

All of this controversy leads to one inescapable conclusion -- the white area restriction is a problem in dire need of a solution. Because Congress specifically incorporated a Commission rule -- *i.e.*, the Grade B signal standard -- into the white area restriction, and because that term is at the heart of the controversy over the restriction, only the Commission possesses the necessary regulatory expertise and thus is uniquely positioned to address this problem. For the reasons set forth below, the Commission also should do so as a policy matter.

ARGUMENT

THE COMMISSION SHOULD REFINE THE GRADE B SIGNAL INTENSITY STANDARD FOR PURPOSES OF THE SHVA AS A MEANS OF INCREASING COMPETITION TO CABLE

As noted above, because the Commission possesses unique regulatory expertise with respect to the Commission-defined term -- Grade B signal -- at the root of the white area problem, the Commission is the only appropriate body to consider and adopt a remedy.[8] There is, however, an even more compelling policy reason why the Commission should address this problem. The Commission should modify the Grade B signal standard for purposes of the SHVA because doing so will further the Commission's goal of promoting competition in the video services marketplace. Specifically, Commission action on this issue is warranted because it will promote the long-awaited development of satellite television as a viable competitor to cable television.

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[8] Neither the courts, the Copyright Office, nor Congress has the FCC's long familiarity with the Grade B standard or the technical expertise to develop refinements to that standard to ensure that "unserved households" are not erroneously classified as "served." The Copyright Office has acknowledged as much, stating that it "lacks expertise in communications law." *Copyright Office Report* at 118.

A. The Cable Television Industry Has Been And Continues To Be Characterized By A Lack Of Competition

Six years ago, Congress passed the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") largely in response to constituent concern over ever-increasing cable rates. Noting that since 1984, average monthly cable rates had grown almost three times as fast as the Consumer Price Index,[9] Congress directed the Commission to establish rules to govern rate regulation of cable systems that are not subject to effective competition.[10] By tying rate regulation to the existence of effective competition, Congress clearly envisioned that market forces eventually would curb cable rates. Indeed, Congress, in reliance on this assumption, specifically mandated in the Telecommunications Act of 1996 that rate regulation for expanded basic tiers would sunset in 1999.[11] Moreover, Congress required the Commission annually to report to Congress "on the status of competition in the market for the delivery of video programming."[12]

In the first such annual report, released in late 1994, the FCC stated that "[a]t present, competitive rivalry in most local multichannel video programming distribution markets is largely, often totally, insufficient to constrain the market power of incumbent cable systems."[13] Three years later, in late 1997, cable rates remained unconstrained, with cable rates rising more

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[9] *See* 1992 Cable Act, Pub. L. No. 102-385, § 2(a)(1), 106 Stat. 1460, 1460. *See also*, H.R. Conf. Rep. No. 102-862, at 49, 53, 56 (1992).

[10] 47 U.S.C. § 543(a)(2)(A)-(B).

[11] *Id.* at § 543(c)(4).

[12] *Id.* at § 548(g).

[13] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7556 (1994).

than four times the increase in consumer prices.[14] In response to public and Congressional outcry over these increases, as well as a petition to freeze cable rates filed by the Consumers Union and Consumers Federation of America,[15] the Commission in December 1997 held an *en banc* hearing to consider the status of competition in the multichannel video market.[16]

At the *en banc* hearing, several FCC commissioners expressed the view that competition, rather than regulation, was the preferred solution to the problem of rising cable rates. Chairman Kennard stated that "[r]egulation should always be the last resort" and that the "bottom line" is that "[w]e need more competition."[17] Commissioner Ness concurred, stating that "[t]he best answer to rate hikes is additional competition."[18] Commissioner Powell stated that rising cable rates should be seen "as a sign that we need to accelerate our efforts to get to [a] competitive world as soon as possible."[19]

That competitive world, however, has not yet arrived. In its most recent annual report to Congress released earlier this year, the Commission noted that "the cable industry continues to

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[14] Brooks Boliek, *FCC Cold to Cable Rate Freeze,* The Hollywood Reporter, Dec. 19, 1997, at 4 ("*Cable Rate Freeze*").

[15] *Implementation of Sections of the Cable Act of 1992, Rate Regulation, Horizontal and Vertical Ownership Limits, Developments of Competition and Diversity of Video Programming Distribution and Carriage*, MM Dkt. Nos. 92-264, 92-265, 92-266, Petition to Update Cable Television Regulations and Freeze Existing Cable Television Rates, filed by Consumers Union and Consumers Federation of America (Sept. 23, 1997).

[16] FCC Public Notice, *Commission to Hear Presentation on the Status of Competition in the Multichannel Video Industry December 18, 1997*, 1997 FCC LEXIS 6959 (Dec. 11, 1997).

[17] Lance Gay, *FCC Says Competition Can Limit Cable Rates*, Pittsburgh Post-Gazette, Dec. 19, 1997, at C-7.

[18] Roger Fillion, *FCC May Help Cable Foes Dish Out Competition*, The Des Moines Register, Dec. 19, 1997, at Business-10.

[19] *Cable Rate Freeze,* at 4.

occupy the dominant position in the MVPD marketplace."[20] Based on the report, Chairman Kennard concluded that "less than 15 months away from the sunset of most cable rate regulation, it is clear that broad-based, widespread competition to the cable industry has not developed and is not imminent."[21] In this less-than-competitive landscape, cable rates continue to rise. The United States Department of Labor's Consumer Price Index reveals that cable rates rose 0.7 percent in June 1998, compared to an overall inflation rate of 0.1 percent.[22]

B. Refining The Current Grade B Signal Intensity Standard For Purposes Of The SHVA Would Foster The Development of Satellite Television As A Viable Competitor To Cable

Clearly, satellite television represents a potential significant competitor to cable television. As the Commission recently noted, DBS operators have more subscribers than any type of MVPD other than franchised cable operators.[23] Yet, as noted above, satellite television has not yet developed to the point of being able to act as a competitive restraint on cable prices. This is due to the fact that satellite television suffers from a competitive disadvantage to cable. The primary reason for this competitive disadvantage is the cumulative effect of the regulatory impediments that make it so difficult for satellite operators to distribute network signals when compared to cable systems.

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[20] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1038 (1998) ("*Fourth Annual Report*").

[21] *Fourth Annual Report* at 1238.

[22] *Inflation Outstripped; Cable Rate Figures Could Provide Fodder for Hearing*, Communications Daily, July 15, 1998, at 2.

[23] *Fourth Annual Report* at 1070. DIRECTV, USSB, EchoStar and Primestar (which provides DBS-like medium powered fixed satellite service) together served more than 5.1 million subscribers as of June 1997. *Id.* SBCA research indicates that as of June 30, 1998, there were 7.25 million subscribers.

To be sure, refining the Grade B standard for purposes of the SHVA will not eliminate the white area restriction. It will, however, allow satellite operators to provide the millions of Americans who cannot receive an acceptable over-the-air broadcast signal with a meaningful competitive alternative to cable television. Absent the ability to provide these consumers with network signals, satellite operators will continue to be at a serious disadvantage vis-a-vis cable operators because those consumers who wish to watch network television will have no choice but to subscribe to cable. Such an anticompetitive effect would run directly counter to the Commission's policy objective of developing and fostering competition in the MVPD market, both as a means of giving consumers greater choice and of driving cable rates down.

The Commission can -- and should -- eliminate this disadvantage in order to help level the competitive playing field between satellite operators and cable operators. The Commission has taken a number of actions designed to increase competition to cable. Just recently, for example, the Commission determined that a SMATV operator that distributes its video programming in part over a telephone company's common carrier facilities is not required to obtain a franchise under the Communications Act.[24] The Commission noted that its decision "is consistent with the pro-competitive mandate imparted on the Commission by Congress in enacting the 1996 Act."[25] The Commission further noted that the SMATV operator's service would both promote competition in the MVPD marketplace and enhance consumer choice.[26]

Allowing satellite operators to provide network television signals to consumers who cannot receive them over the air similarly would promote competition and enhance consumer

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[24] *Entertainment Connections, Inc. Motion for Declaratory Ruling*, FCC No. 98-111 (June 30, 1998).

[25] *Id.* at ¶ 64.

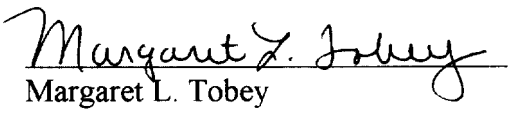
[26] *Id.*

choice. Congress intended satellite subscribers to receive these signals and attempted to incorporate an objective standard into the SHVA to achieve this purpose. However, the standard has been interpreted in the manner least favorable to consumers in the recent judicial decisions. As a result, existing subscribers who should be entitled to receive network signals are being deprived of services they want and have paid for. Equally disturbing, potential customers will be discouraged -- perhaps irretrievably -- from subscribing to satellite services because of confusion over the broadcast signals they lawfully can receive. These consequences directly undermine the Commission's objective of fostering competitive alternatives to cable. The public interest therefore requires the Commission to refine the definition of a Grade B signal for purposes of the SHVA.

CONCLUSION

For the reasons set forth above, the Commission should initiate expeditiously a rulemaking proceeding to refine the definition of a Grade B signal for purposes of the SHVA.

Respectfully submitted,



Margaret L. Tobey
Susan H. Crandall
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W. Suite 5500
Washington, DC 20006

Counsel for the Satellite Broadcasting & Communications Association

July 22, 1998

CERTIFICATE Of SERVICE

I, Kathryn M. Stasko, do hereby certify that the foregoing **COMMENTS ON THE EMERGENCY PETITION FOR RULEMAKING OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE** were delivered, via hand delivery (except where otherwise noted) on this 22nd day of July, 1998, to the following:

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commission Michael Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commission Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Christopher J. Wright
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Roy Stewart
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 314
Washington, D.C. 20554

Regina M. Keeney
Chief, International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, D.C. 20554

Deborah A. Lathen
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, D.C. 20554

Dale Hatfield
Chief, Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W., Room 480
Washington, D.C. 20554

Steve T. Berman*
Senior Vice President
Business Affairs and General Counsel
National Rural Telecommunications Cooperative
2201 Cooperative Way, Suite 400
Woodland Park
Herndon, Virginia 20171

Jack Richards, Esq.*
Paula Deza, Esq.*
Nicole Donath, Esq.*
Keller and Heckman LLP
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001

Henry L. Baumann*
Benjamin F.P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

*By first-class mail, postage prepaid.

Kathryn M. Stasko

Kathryn M. Stasko

dc-123834